

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218573 **DATE:** May 9, 1985
MATTER OF: H. Angelo & Co., Inc.

DIGEST:

Contracting officer's award of a contract to the second-low bidder following a determination by the Small Business Administration's Regional Office that the low bidder is not small, without waiting for results of an appeal, is not improper and does not constitute bad faith. Under applicable regulations, the contracting officer need only wait for SBA's initial determination or for 10 working days after SBA receives a size status protest, whichever occurs first. Thereafter he may--but is not required to--continue to withhold award.

H. Angelo & Co., Inc. protests the award of a contract to Transco Contracting Co. under invitation for bids (IFB) No. F41800-84-B-7492, a small business set-aside. The IFB, issued on November 24, 1984 by the Department of the Air Force, San Antonio Contracting Center, Fort Sam Houston, Texas, covers interior and exterior painting at five Air Force facilities in the San Antonio area.

We dismiss the protest.

Angelo, the low bidder, contends that the Air Force should not have awarded the contract to Transco, the second-low bidder, since a final ruling as to Angelo's size status has not been issued by the Small Business Administration's (SBA) Office of Hearings and Appeals. The firm is challenging a decision by the SBA's Atlanta Regional Office that it is not a small business concern, alleging that the determination was based on erroneous information as to its receipts over the past 3 years.

Angelo argues that the contracting officer acted in bad faith in making an award on the basis of urgency shortly after the SBA rendered its initial decision on April 3, 1985, because Angelo had agreed, on April 12, to

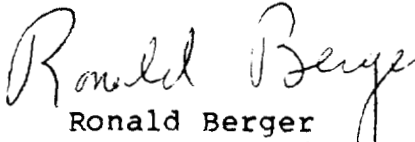
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extend its bid for another 30 days. Angelo asserts that the contracting officer should have awaited the outcome of its appeal, suggesting that there is no validity to the asserted urgency that is the basis for award. Angelo asks that the Air Force suspend performance until our Office renders a decision on the propriety of the contracting officer's actions or, impliedly, until SBA completes its review.

Under the Federal Acquisition Regulation, 48 C.F.R. § 19.302(h)(1) (1984), when a size status protest has been filed, a contracting officer may not make an award until the SBA Regional Administrator has issued a determination or until 10 working days after SBA's receipt of the protest, whichever occurs first. After the 10 days have expired, the contracting officer may--but is not required to--continue to withhold award. Id., § 19.302(h)(2). Although the regulations provide for an appeal from an SBA size determination by any concern that has been adversely affected, there is no requirement that the contracting officer withhold award during the appeal period. Id., § 19.302(i); John C. Holland Enterprises, B-216250, Sept. 24, 1984, 84-2 CPD ¶ 336. Similarly, although to make an award before the initial 10 days expire the contracting officer must make a finding that this must be done to protect the public interest, 48 C.F.R. § 19.302(h)(1), there is no such requirement for justifying an award during the appeal period. Under these circumstances, since the contracting officer's actions were consistent with the regulations, we do not view the protester as having made out a case of possible bad faith on the part of the contracting officer.

We dismiss the protest.


Ronald Berger
Deputy Associate
General Counsel